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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO._____

John C. Amis, Jr., President
Amey + Monge, Inc.
Petitioner,

vs.

Internal Revenue Service
Charles O. DeWitt
Respondent.

On Appeal from the Eleventh
Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
For the Eleventh Circuit

John C. Amis, Jr.
In Propria Persona
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June, 1982

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QUESTIONS PRESENTED FOR REVIEW

In denying Attorney fees and costs to Appellant, did the Eleventh Circuit err and render a decision in conflict with the D. C. Court of Appeals?

Did Congress, when it enacted Public Law 93-579, intend that Pro Se litigants in Freedom of Information Act and Privacy Act cases be paid Attorney fees and costs?

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John C. Amis, Jr., President

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Respondent.

Appellant contends that in denying Attorney fees to Appellant, the Eleventh Circuit erred and came in conflict with the D.C. Circuit.

The Supreme Court has jurisdiction under Article III of the Constitution of the United States and under 28 U.S.C. 1253.

OPINION BELOW

The Opinion of the Eleventh Circuit Court of Appeals is appended.

PROCEDURAL GROUNDS FOR JURISDICTION

The District Court, without a hearing, denied Attorney fees and costs to Appellant.

The Opinion of the Eleventh Circuit Court of Appeals affirmed the Judgment of the District Court.

Notice of Appeal to the Supreme Court of the United States was filed in the Court of Appeals on April 9, 1982.

This Appeal is being docketed in the Court within 90 days from the Opinion of the Eleventh Circuit Court of Appeals. Dated March 30, 1982.

STATEMENT OF THE CASE

This Appeal arises from the district court's denial of the request of the Appellant, John C. Amis, Jr., for Attorney fees under section 552(a)(4)(E) of the Freedom of Information Act (FOIA). The principal issues for review are whether Amis, a Pro Se litigant, who brought action, may recover Attorney fees under section 552(a)(4)(E).

After months of litigation, the Appellees decided to release the information rather than submit to an in camera inspection as ordered by the Court.

Although Amis has substantially prevailed in this litigation within the meaning of section 552(a)(4)(E) the Court held that he was not entitled to an award of Attorney fees.

Appellant instituted this litigation on October 2, 1980, after having exhausted all administrative procedures, to obtain the records of Amey + Monge, Inc. The government resisted disclosure of the records and the case was argued before the United States District Court for the Middle District of Florida. At the hearing on January 7, 1982, the Court ordered the Defendant to comply with detailed justification, itemization, and

indexing in a form to comport with Vaughn v. Rosen, 484 F2d 820 (D.C. Cir. 1973).

The Appellees decided to release the information instead of complying with the Court's order.

After the documents were released, Appellant filed for Attorney fees and costs, but the Court denied the request.

REASONS FOR GRANTING CERTIORARI

Congress has specifically provided for the award of Attorney fees in FOIA suits by enacting section 552(a)(4)(E). The legislative history of that section is extensive and illuminating. Congress realized that too often the insurmountable barriers presented by Court costs and attorney fees to the average person requestion information under the FOIA enabled the government to escape compliance with the law. Recognizing that the FOIA had established a national policy of public disclosure of government information, Congress found it appropriate and desirable, in order to effectuate that policy, to provide for the assessment of attorney fees against the government where the complainant prevailed in FOIA litigation.

The Senate version of what was to become section 555(a)(4)(E) specified four criteria to be considered by the Court in exercising its discretion to award attorney fees: (1) the benefit to the public, if any, derived from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding of the records had a reasonable basis in law. The conference substitute followed the Senate version except that the criteria set forth above were eliminated. The conference report explicitly states, however that by eliminating these criteria the conferees did not intend to make the award of attorney fees automatic or to preclude the Courts, in exercising their discretion in awarding such fees, from taking such criteria into consideration. Instead

the conferees believed that because the existing body of law on the award of attorney fees recognized such factors, a statement of the criteria would be too delimiting and therefore was unnecessary.

The appellees contend that since the documents were released voluntarily and not as the result of a court order or judgment, the appellant did not substantially prevail and therefore is not eligible for an award of costs and attorney fees. This contention has no merit. Recent court decisions and the legislative history of section 552(a)(4)(E) support a contrary conclusion. In Vermont Low Income Advocacy Council v. Usery, 546 F.2d 509 (2d Cir.1976), the Second Circuit held that under section 552 (a)(4)(E) a judgment is not an absolute prerequisite to an award of attorney fees. Judge Friendly thought it clear that Congress did not mean that, where a FOIA suit had gone to trial and developments made it apparent that the Judge was about to rule for the complainant, the government could abort an award of attorney fees by an eleventh hour tender of the information requested.

Various district courts are in agreement with the Second Circuit. In Goldstein v. Levi, 415 F.Supp.303,305 (D.D.C. 1976), Judge Parker held that the purpose of section 552(a)(4)(E) was to encourage private citizens to bring to the attention of the courts any unlawful withholding of information by government agencies. The Court reasoned that this purpose would be defeated and frustrated if complaints were forced to forfeit their claim for fees upon the surrender of the materials before formal action by the Court.

In Communist Party of the United States v. Department of Justice, No. 75-1770, Slip op. at 3(D.D.C. March 23, 1976), Judge Flannery expressed the view that:

> [i]f the government could avoid liability for fees merely by conceeding the cases before final judgment, the impact of the fee provision would be greatly reduced. The government would remain free to assert boilerplate defenses, and private parties

who served the public interest by enforcing the Act's mandates would be deprived of compensation for the undertaking.

Finally, in Kaye v. Burns, 411 F. Supp. 897,902 (S.D.N.Y. 1976), Judge Carter stated that it was inconceivable that the recovery of attorney fees could be foreclosed whenever the government chose to moot an action under the FOIA by supplying, during the pendency of the litigation, the material sought in the complaint. The Court concluded that a proper construction of the "substantially prevailed" requirement in light of section 552(a)(4)(E)'s legislative history and intent, would not preclude the recovery of attorney fees and litigation costs where the government, after commencement of the litigation, had acted to moot the action by supplying the material sought.

Appellant did substantially prevail within the meaning of section 552(a)(4)(E). See American Federation of Government Employees v. Rosen, 418 F. Supp. 2t 209. The government, faced with the Vaughn v. Rosen indexing order decided to supply the material requested. The Court's order had a causative effect on the government's decision. The government decided to surrender the documents rather than go through a review by the Court or special master. The case would never have reached the status it did if Appellant had not doggedly pursued the matter.

[4] In enacting section 552(a)(4)(E) Congress sought to encourage the average person, who would ordinarily find the barriers of court costs and attorney fees insurmountable, to pursue legitimate FOIA actions. The effectiveness of this incentive would be greatly diminished if the complaintant was forced to bear the costs whenever the government chose to release the requested information during the pendency of the action but prior to a judgment or a court order.

Although a complaintant may have substantially prevailed in an action, the award of costs and attorney

fees does not automatically follow. There are other factors which the Court should consider in determining the appropriateness of an award of costs and attorney fees. The conference report indicates that the criteria listed in an earlier senate report are to be considered as part of the existing body of law on the award of attorney fees.

[5] Whether the government's withholding of the information requested had a reasonable basis in law should be an important factor in the Court's exercise of its discretion under section 552(a)(4)(E). The FOIA requires disclosure upon request of identifiable agency records, unless those records fall within one of nine specific exemptions. NLRB v. Sears, Roebuck and Co., 421,U.S. 132, 136,95 S.Ct.1504,44 L.Ed.2d 29(1975). To satisfy the "reasonable basis in law" requirement it is not necessary for the Court to find that the information the government chose to withhold was in fact exempt. Keye v. Burns, 411 F.Supp. at 908. What is required is a showing that it had not been recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior.

In this case the government has not satisfied the reasonable basis requirement. At no stage in this litigation did the district court find that any parts of the documents were exempt. This confirms that the government had no reasonable basis for concluding the withholding to be proper. Even a development of the reasonableness of the government's opposition does not preclude a recovery of costs and attorney fees. It is but one aspect of the decision left to the discretion of the trial court.

The trial court issued an order on March 13, 1981 which granted Appellees an extension of time to April 15, 1981, in which to file a memorandum in opposition to Appellant's motion for attorney's fees. The time expired and no memorandum was filed in opposition to Appellant's request for attorney's fees and costs. The Court then ruled on April 21, 1981 that "an award of

attorney's fees is neither merited nor awarded".

Appellant submits that in enacting section 552(a)(4)(E) Congress sought to lower the barriers facing the average person requesting information. Furthermore, successful FOIA litigants enhance the public interest by bringing the government into compliance with the law. As agents of the national policy of public disclosure it is equitable that they be awarded for their service. Under current federal attorney fee statutes when the social service rendered by the prevailing party is substantial, the courts have been willing to dispense with formal and rigid attorney and client requirements. See Clark v. American Corp., 320 F.Supp.709(E.D.La.),aff'd 437 F2.d 959 (5th Cir. 1970). A successful FOIA litigant is entitled to similar consideration.

As a successful FOIA complaintant, Appellant has rendered substantial service to both the government by bringing it into compliance with the policy underlying the FOIA, and to the public at large by securing for it the benefits assumed to flow from public disclosure of government information.

Most successful FOIA actions result in the vindication of important benefits on the public generally. Consumers Union v. Board of Governors of the Federal Reserve System, 410 F.Supp.63 (D.D.C. 1976).

The facts in this case prove that Appellant vigorously litigated this suit and did substantially prevail.

CONCLUSION

For these reasons, the Petition for a Writ of Certorari should be granted.

Respectfully submitted,

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